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No. _____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

JAMES A. GARDNER, *Petitioner*,

v.

THE BRADENTON HERALD, INC., *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REASONS FOR DENYING THE WRIT

§ 934.091, Fla. Stat. (1977) Is An Unwarranted And Constitutionally Unauthorized Restriction On The Freedom Of The Press, As Guaranteed By U.S. Const. Amend. I And XIV

> "The sole and limited issue for . . . determination concerns the authority of the state to direct without exception of procedural safeguards the criminal punishment of any person who truthfully publishes without malice the name of an unindicted subject of interceptions or wiretaps.
>
> "The absolute terms of this statute effectively result in a prior restraint on the press. Prior restraints have always been accorded the most exacting judicial scrutiny. *Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975)." *Gardner* v. *The Bradenton Herald, Inc.*, ___ So. 2d. ___ (1982). (A. 2)

This litigation involves no claim of special access to police, investigative information; the publication of the

contents of intercepted communications; or, civil liabilities for damages resulting from a publication. The remaining provisions of the Florida security of communications statute, §934.10, Fla. Stat. (1977) (which have not been challenged in this litigation), provide a civil remedy, including compensatory damages of $100.00 per day up to $1,000.00, punitive damages and attorney's fees, to a person whose communication has been violated, contrary to the provisions of the statute. Disclosure of information obtained during a lawfully authorized and judicially supervised communication intercept is not a crime. This was noted in the Final Judgment rendered by the trial court. (A. 27) Petitioner emphasized the importance of wiretaps and the frequency with which they are authorized; however, the subject decision does not involve these issues. Although the Florida wiretap statute is similar to the federal act, 18 U.S.C. §§ 2510-2520 (1968), there is no provision in this federal statute which corresponds with the challenged Florida statute.

This statutory prohibition from publication continues after the parties to intercepted communication have been notified of the date and period of the interception; contents thereof; and, applications and orders relating thereto. Consent to publication by the subject does not remove criminal liability. As noted in the trial court's Judgment (A. 26), an innocent publication of the subject's name or identity without reference to the interception is prohibited.

This legislated silencing of the press has no definite period of limitation, ending only *if* an indictment or criminal information is eventually filed. Even after the investigation is over and the subject's accomplice or associate in crime is prosecuted, no statutory exception exists to authorize the publication of the name of the subject

who may by then even be identified in official court records. In the case *sub judicia* all criminal investigations and proceedings have been concluded but because John Doe was never indicted or informed against, Respondent's publication of his identity is prohibited by the subject statute. The press is the single target of prosecution for naming or identifying the subject through broadcast, newspaper, magazine, periodical, or news publication. The maximum penalties are $10,000.00 and five years imprisonment.

The Florida Supreme Court enumerated the statutory deficiencies as follows:

> "We do not minimize the asserted state interests which could be affected by the contemplated publication. We believe it is important to recognize that we are not faced in this cause with a narrowly drawn statute closely tailored to interests such as protecting the national security, protecting the safety of undercover officers, preserving an ongoing investigation,, protecting the life of a kidnap victim, or ensuring a fair trial. Nor are we faced with a statute incorporating adequate procedural safeguards such as a prior hearing before a court of competent jurisdiction, which would allow a balancing of interests." (A. 5)

This Court addressed the almost identical issue presented in the present case in *Landmark Communications* v. *Virginia*, 435 U.S. 829, 98 S. Ct. 1535, 56 L. Ed. 2d 1 (1978). The Virginia Supreme Court had ruled that maintaining confidentiality in a state commission's investigation of a judge's fitness was required to: protect the judge's reputation from adverse publicity; maintain confidence in the judicial system; and, protect complainants and witnesses from possible recrimination prior to validation of a complaint. In rejecting the express findings of the Virginia Supreme Court that the "clear

and present danger" test had been satisfied, in the furtherance of these laudable state purposes, which the Virginia legislature had also expressed to be purposes of the act, this Court, speaking through Mr. Chief Justice Burger, held that these "justifications" were constitutionally deficient. The accomplishments of confidentiality in judicial investigations was insufficient to allow such potential or actual infringement upon the freedom of the press. Such constitutionally prohibited legislation amounted to the punishment of third persons, who were strangers to secret investigations. Punishment resulted from the publication of truthful information obtained from confidential informants. Such censorship would necessarily cut "near the core of the First Amendment . . ." *id.* 838.

Petitioner places much emphasis upon the proposition that the lawful obtainment from within the public domain of the material to be published is a necessary condition precedent to publication. The cited cases of *Cox Broadcasting Corporation* v. *Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975); and, *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 99 S. Ct. 2667, 61 L. Ed. 2d 399 (1979), contain these factual elements but no decision has been cited which expressly held this to be a *requirement*. In *Landmark*, *supra*, information was obtained from a confidential informant who was subject to sanctions for disclosing the information that was not open to public inspection or already within the public domain.

The *Branzburg* v. *Hayes*, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972), decision recognized that the press was not required to obtain information from only within the public domain. While ruling that newspaper reporters could be compelled to testify to grand juries about their

public knowledge of criminal acts and personalities, this Court expressly limited its decision and stated:

> ". . . without some protection for seeking out the news, freedom of the press could be eviscerated. . . . no penalty, civil or criminal, related to the content of published material is at issue. . . . *id.* 682.
>
> "This conclusion itself involves no restraint on what newspapers may publish or on the type or quality of information reporters may seek to acquire, nor does it threaten the vast bulk of confidential relationships between reporters and their sources." *id.* 691.

Staff reporter Branzburg published through the press the criminal act he had observed. Neither *Branzburg* nor the present case before this Court involve any claim that a special right of access to government information exists, contrary to Petitioner's extensive argument of law on this subject as illustrated by his citation of *Pell* v. *Procunier*, 417 U.S. 817, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974).

Although, as noted by Petitioner, the distinction between a true "prior restraint" case through injunction and one resulting from criminal sanctions is without a difference, *New York Times Company* v. *United States*, 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971) was a true "prior restraint" case. The advocated, compelling state interest to be protected by prohibiting the publication of the classified "Pentagon Papers" was national security, as distinguished from the protection of the participants in and subjects of a wiretap. A crime was, in fact, committed when the "Papers" were provided by a confidential informant to the press, whereas the "leak" of John Doe's name to The Bradenton Herald violated no criminal law. It was recognized that a publication of the "Papers" would not only be embarrassing to the government but that it could also jeopardize the diplomatic corps

in our country's "first line of defense" and possibly even the personal safety of our soldiers. Yet, with such compelling state interests, the provisions of the First Amendment protected the right of the press to publish the sensitive information it possessed, without regard to how it was obtained.

The "criminal sanctions" restraint as advocated by Petitioner for the protection of disclosural privacy is an improperly selected "tool" with which to accomplish this objective. Such implementation would be analogous to seeking an injunction against defamatory publications, which is prohibited by Florida law. *Moore* v. *City Dry Cleaners & Laundry, Inc.*, 41 So. 2d 865 (Fla. 1949). As illustrated by the decision of *New York Times, supra*, an extremely strong justification must exist for the imposition of a prior restraint of expression. No such justification exists in either this case or in *Landmark, supra*. To accept Petitioner's argument would constitute an invitation to legislate, without any limitation or standard in the name of "state interest," prohibitions against the publication of information known to the press. Such an invitation is constitutionally impermissible in our United States. U.S. Const. amend. I and XIV.

Petitioner's advancement that John Doe's right of privacy constitutes a sufficient state interest to withstand the constitutional challenge of the subject statute appears to be much less significant than the state interests expressed in *New York Times* and *Landmark, supra*. The zone of privacy emerging from the Bill of Rights and limitations expressed therein, as recognized by this Court in *Paul* v. *Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976), and that provided under Florida law, were considered by the Florida Supreme Court in this litigation. However, the emerging and yet

briefly defined right of privacy was contrasted with the better defined and expressly protected freedom and liberty of the press. That Court, having considered the disclosural privacy issues, as again presented by Petitioner herein, stated:

> "We also do not have before us, nor do we reach, any question concerning the possible private cause of action that John Doe or similarly situated persons might have for libel or invasion of privacy against any news medium. . . . The state in the person of the state attorney has no standing in this proceeding to assert the privacy rights of those persons it has wiretapped." (A. 4)

As previously noted, civil, statutory remedies are provided to redress wrongs resulting from a violation of the Florida wiretap statute. Because the remaining authorities cited in support of the Petition are distinguishable from this case, there is not a sufficient justification for further review of the limited issue presented herein.

United States v. *Fuller*, 202 F. Supp. 356 (N.D. Cal. 1962), cited by Petitioner, upheld a statute prohibiting interception of police communications. The case is not on point as Respondent seeks no special access to information or the right to intercept communications. Rather it sought to exercise its right to publish the fact that John Doe was wiretapped. Petitioner notes in his brief that the press

> ". . . guards against the miscarriage of justice by subjecting the police, prosecutors and judicial processes to extensive public scrutiny. . . ." *Sheppard* v. *Maxwell*, 384 U.S. 333, 350, 86 S. Ct. 1507, 16 L. Ed. 2d 200 (1966).

§ 934.091, Fla. Stat. (1977) unconstitutionally limits this function.

Petitioner's citation of *State* v. *Evjue*, 33 N.W. 2d 305 (Wisc. 1948), and *Nappier* v. *Jefferson Standard Life Insurance Company*, 322 F. 2d 502 (4th Cir. 1963), as analogous to the case at bar, in view of the subsequent decision of this Court in *Cox Broadcasting Corporation* v. *Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975), does not appear to be meritorious. These cases are discussed in his cited annotation of 86 ALR 3d 80, which notes the infrequency of such rulings. The identification of a sexual assault victim, the subject of both of those cases, is included in the invasion of privacy category of Am. L. Inst., Restatement of Torts 2d §§652A-6521 (Tentative Draft No. 22) (April 5, 1976), creating liability for publishing matters concerning one's private life. Excluded from liability in this category are matters of legitimate concern to the public. The identity of a sex crime victim is not of such concern:

> "At most the publication of the identity of the female ministers to a morbid desire to connect the details of one of the most detestable crimes known to the law with the identity of the victim." *State* v. *Evjue*, *supra* 312.

However, the activity of the police in investigating crime and conducting wiretaps is of public concern.

In *Cox Broadcasting Corporation*, *supra*, this Court held that the republication of a rape victim's name from records open to public inspection, contrary to a Georgia statute imposing criminal penalties therefor, did not give rise to a civil cause of action for invasion of the father's right of privacy. The *Nappier*, *supra*, decision noted that, absent a shield statute, fear of publicity would deter victims from reporting sex crimes and thereby thwart prompt investigation of the crime. The advancement of such a "public interest" is not within § 934.091, Fla. Stat.

(1977), and the absoluteness of these decisions has been diluted by *Cox Broadcasting Corporation, supra.* A more analgous factual comparison with the case *sub jucicia* are the cases of *Landmark* and *New York Times, supra.*

The removal of § 934.091, Fla. Stat. (1977) from the laws of Florida will in no way affect the privacy rights of John Doe or the State's investigative abilities. Judicial enforcement and control over investigative personnel during communication intercepts through the contempt powers of the authorizing court are neither changed nor affected by the Florida Supreme Court's decision herein.

CONCLUSION

Respondent respectfully urges this Court to deny the Petition upon consideration of the areas of law addressed by the parties as the issue presented in the Petition has already been settled by this Court, there being no justification for the issuance of a Writ of Certiorari to the Supreme Court of Florida.

Respectfully submitted,

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